a question for you, members of the jury. On this question medical evidence is important and you are entitled to take into consideration the medical evidence and the other evidence including the acts or statements of accused No. 1 and his demeanour. The question which you must decide is this: Was the abnormality of mind such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing? This is a question of degree and essentially one for you, members of the jury."

The learned trial Judge then dealt at length with the evidence of Dr. Winslow and drew the jury's attention to the injury to the appellant's eye, and then left the issue for the jury's determination.

It was contended before us that the evidence was all one way, namely Dr. Winslow's uncontradicted evidence and the appellant's evidence as to his own state of mind and that, in the circumstances the jury's failure to return a verdict of culpable homicide not amounting to murder was unreasonable.

While it is clear law that the jury must act on evidence, it is also clear law that while diminished responsibility depends in the main on medical questions and the evidence of medical experts there are involved in a defence based on diminished responsibility matters of fact on which a jury is just as fit to express their view of the facts as is a doctor, and that the decision is for the jury and not for the doctors.

The evidence of Dr. Winslow we have already sufficiently outlined. It showed that when he first examined the appellant on the 24th June 1963 i.e. approximately two months after the alleged murder he found the appellant not suffering from any form of mental illness. About 10 days later Dr. Winslow examined the appellant again and formed the opinion that he was then suffering from schizophrenia, caused he knew not why but possibly because of the mental strain of awaiting trial. About 7 weeks later, on again examining the appellant Dr. Winslow formed the opinion that he was of sound mind and capable of making his defence on the charge of murder. At the trial Dr. Winslow's attention was drawn to the eye injury which the appellant suffered during the fight with the deceased and was questioned as to the effect on a person receiving such an injury. His replies were to the effect that such a person might suffer a mild cerebral concussion rendering him either dazed or unconscious for one or two seconds and might also suffer confusion resulting in the impairment of the higher mental functions. He further said that the general experience is that those who have a tendency to mental illness also have a greater tendency to post-concussion confusion as compared with those who have no tendency to mental illness.

On the evidence of Dr. Winslow and the other evidence at the trial we are of the opinion that there was no such unchallenged evidence that the appellant was suffering from abnormality of mind as substantially impaired his mental responsibility for his acts in doing the killing of the deceased that it can be rightly said that the verdict of murder was unreasonable or cannot be supported by the evidence.

In the result we dismissed the appeal.

Appeal dismissed.

KESAR SINGH v. SEPANG OMNIBUS CO. LTD.

[O.C.J. (Ismail Khan J.) February 24, 1964]

[Seremban — Originating Motion No. 25 of 1962]

Company—Private company—Shares—Sale of—Refusal of directors to register transfer—Articles conferring absolute and uncontrolled discretion on directors to refuse—Whether refusal bona fide in interests of company.

Where directors of a company are given by the Articles of Association an absolute and uncontrolled discretion with regard to registering a transfer of shares the only limitation on the directors' discretion is that it should be exercised *bona fide* in the interests of the company.

Once the directors have stated on oath that they have exercised their discretion in the interests of the company it must be assumed that they have so exercised their discretion unless the contrary is established by cross-examination of the deponents or by establishing a substantive case showing that the discretion has been wrongly exercised, though in some cases this may appear from the affidavit.

Case referred to:—

(1) *Re Smith & Fawcett, Ltd.*, [1942] 1 All E.R. 542; [1942] Ch. 304.

MOTION.

Morris Edgar for the applicant.

Edgar Joseph Jr. for the respondent.

Ismail Khan J.: This is an application by way of motion on the part of the applicant that the register of members of the respondent company may be rectified by striking out the name of K. V. Nadarajah therefrom as the holder of 1,500 shares of the said company and also by striking out the name of Too Koke Wee therefrom as the holder of 100 shares of the said company, and by inserting in lieu thereof the name of the applicant as the holder of 1,600 shares.

It is agreed that only the application in respect of the 1,500 shares should be dealt with.

According to his affidavit in support of the application, the applicant obtained a transfer of 1,500 shares in the company (a private company) on the 21st September, 1961, from Nadarajah the shareholder. On 25th September, 1961, he wrote to the secretary of the company informing him of the transfer and requesting him to register the said shares in his name. On the 24th November, 1961, he was informed that the directors had rejected the said transfer and had refused the registration thereof. The applicant alleges that

in refusing to register the transfer the directors had failed to exercise their powers under Article 30 of the Articles of Association of the company *bona fide*. Article 30 reads as follows:—

"The right of members to transfer their shares shall be restricted as follows:—

(a) No share shall be transferred to a person who is not a member so long as any member or any person selected by the directors as one whom it is desirable in the interests of the company to admit to membership is willing to purchase the same at the fair value.

(b) The directors may in their absolute and uncontrolled discretion refuse to register any proposed transfer of shares."

In his affidavit in reply, Ginder Singh, one of the directors, stated that on the 19th August and 4th November, 1961, board meetings were held to consider the question of the transfer of the 1,500 shares. The directors, acting in good faith, in the interests of the said company and with due regard to the shareholder's right to transfer his shares, came to the conclusion that the registration of the transfer of the said shares should be refused and that notice of refusal was duly given by the company.

It does not appear that the directors had selected a buyer under Article 30(a), but Article 30(a) is subject to Article 30(b) which gives the directors absolute or unfettered discretion to register any transfer of shares.

The principles to be applied in cases where the directors are given by the articles of association of a company a discretion with regard to the acceptance of shares are set out in the case of *Re Smith & Fawcett, Ltd.*[1] In that case the articles of association provided that the directors may at any time in their absolute and uncontrolled discretion refuse to register any transfer of shares. The appellant, as executor of his father, claimed to be registered in respect of 4,001 shares. The directors refused to register a transfer unless he was willing to sell 2,000 of the shares to a named director at a certain price in which case they would register a transfer of the remainder. It was held, having regard to the terms of the article, the only limitation on the directors' discretion was that it should be exercised *bona fide* in the interests of the company.

Lord Greene, at page 543, in speaking of the discretion of the directors said:—

"The principles to be applied in cases where the articles of association of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for the present purposes, free from doubt. They must exercise their discretion *bona fide* in what they consider — not what a court may consider — to be in the interests of the company, and not for any collateral purpose. They must have regard to those considerations, and those considerations only, which the articles upon their true construction permit them to take into consideration. In construing the relevant provisions in the articles, it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases....The right, if it is to be cut down, must be cut down with satisfactory clarity. It certainly does not mean that articles, if appropriately framed, cannot be allowed to cut down the right of transfer to any extent which the articles on their true construction permit.

There is also another consideration which I think is worth bearing in mind when one comes to examine the construction of any article that falls for consideration, and that is that this type of article is one which is for the most part confined to private companies. Private companies are, of course, separate entities in law just as much as are public companies, but from the business and personal point of view they are much more analogous to partnerships than to public corporations. Accordingly, it is to be expected that, in the articles of such a company, the control of the directors over the membership may be very strict indeed. There are very good business reasons, or there may be very good business reasons, why those who bring such companies into existence should give them a constitution which gives to the directors powers of the widest description.

In the present case the article is as follows:

The directors may at any time in their absolute and uncontrolled discretion refuse to register any transfer of shares.

As I have said, it is beyond question that that is a fiduciary power, and the directors must exercise it *bona fide* in what they consider to be the interest of the company."

Once the directors have stated on oath that they have exercised their discretion in the interests of the company, it must be assumed that they have so exercised their discretion unless the contrary is established by cross-examination of the deponents or by establishing a substantive case showing that the discretion has been wrongly exercised, though in some cases this may appear on the face of the affidavit itself. At page 545 in the above case, Lord Greene observed:—

"If it is desired to charge a deponent with having given an account of his motives and his reasons which is not the true account, then the person on whom the burden of proof lies should, in my judgment, take the ordinary and obvious course of requiring the deponent to submit himself to cross-examination. That does not, of course, mean that it is illegitimate to draw such inferences in a proper case. There may be on the face of the affidavit sufficient justification for doing so."

In the instant case the only step taken by the applicant to establish *mala fide* on the part of the directors was by way of cross-examination of the deponent Ginder Singh and he obtained leave to do so.

In cross-examination Ginder Singh said one reason for the refusal was that the transferor Nadarajah was indebted to the company. There was no grudge against the transferee. The minutes of the directors' meeting held on the 4th November, 1961, confirmed this and also showed that the directors had acted under Article 30 of the Articles of Association. He also stated that one director, Duraisamy, had some dispute with the applicant in 1960 and the latter had threatened to teach him a lesson once he bought shares in the company. According to another

director, Karuppiah, the applicant had assaulted one Rajasingam the then manager of the company. In the circumstances, it was thought that because of his hostile attitude the applicant would be a source of embarrassment to the company. These facts were not set out in the minutes of the directors' meeting, but appeared in the affidavits of the two directors.

Bearing in mind the accepted practice for articles of private companies to contain severe restrictions on the transfer of shares, I am not persuaded from the evidence disclosed in the cross-examination of the deponent that the directors' refusal to register the transfer of the shares has been dictated by anything except a *bona fide* view as to the interests of the company as they, the directors, see them.

The application is dismissed with costs.

Application dismissed.

Solicitors: *Morris Edgar & Co.*; *Joseph & Son.*

RE CHIN SWEE OON

[O.C.J. (Barakbah C.J., Ong & Gill JJ.) February 26, 1964]

[K.L. — Originating Motion No. 44 of 1963]

Advocate and Solicitor—Re-instatement of—Considerations in the light of its own facts—Advocates and Solicitors Ordinance, 1947, s. 34.

The applicant was struck off the Roll of Advocates and Solicitors in October 1957 for misappropriation of a client's money. After a lapse of six years he applied to be replaced on the Roll under section 34 of the Advocates and Solicitors Ordinance.

Held: after taking into account the applicant's age, that he had made full restitution, that he had been truly penitent, that he had the good name of his family to consider at all time, that he had for the past six years lived a blameless life, the Court was satisfied that there was no risk of a repetition of the same or any other offence when he resumed practice and there was no prejudice to the public interest.

[**Editorial Note:** *In re Robins* (2) an attorney having been struck off the Roll in the Easter Term 1859, for misappropriating to his own use money received from a client for a particular purpose, the Court, in 1865, allowed his name to be restored to the Roll, on affidavits of numerous attornies to his good character and conduct in the interval. *In re Pyke* (1) an attorney having been struck off the Roll, in order to be called to the Bar, was afterwards disbarred for professional mis-conduct; the decision of the Benchers being affirmed, on appeal, by the fifteen Judges. After the lapse of twenty years an application was made on his behalf to be re-admitted an attorney; but the Court refused the application, on the ground that there were no affidavits of professional persons and others as to his good conduct and character in the interval. But subsequently, on a second application, it appeared that since his disbarral he had lived a very secluded life; and he had filed affidavits two months before the application, stating every place at which he had lived, and no affidavits were filed impeaching his character. The Court then dispensed with the affidavits usually required of professional and other persons as to his good conduct and character in the interval, and re-admitted him without a re-examination.]

Cases referred to:—

(1) *In re Pyke* (1865), 34 L.J.Q.B. 121 & 220.

(2) *In re Robins* (1865), 34 L.J.Q.B. 121.

APPLICATION FOR RE-ADMISSION AS ADVOCATE & SOLICITOR.

Ng Ek Teong for the applicant.

Au Ah Wah for the Attorney-General.

R. C. M. Ryan for the Local Bar Committee.

R. R. Chelliah for the Bar Council.

Cur. Adv. Vult.

Barakbah C.J.: This is an application for an order that the applicant be replaced on the Roll of Advocates and Solicitors of Malaya under section 34 of the Advocates and Solicitors Ordinance, 1947.

Mr. Ryan on behalf of the Bar Committee filed his report under section 34(3) of the said Ordinance stating that no adverse reports had been received by the Local Bar Committee against the said applicant after he had been struck off the Roll. Therefore, he had no objection to the application.

Mr. Au Ah Wah, on behalf of the Attorney-General and Mr. R. R. Chelliah for the Bar Council objected on the ground that there were no affidavits filed regarding applicant's financial position. See the cases of *In re Pyke* (1) and *In re Robins.*(2) Also the Court had to take into consideration the interest of the public and the profession.

There is no question as to the gravity of the offence which led to the applicant being struck off the Rolls a little over six years ago. What this Court has to consider now is whether good cause has been shown for his re-instatement.

I think the case should be considered in the light of its own facts. Without professing to lay down any length of years as sufficient in respect of the amount of money involved, I am of opinion that the humiliation and exclusion from the practice of his profession has taught him an unforgettable lesson. In a sense he has expiated for his wrongdoing and, provided that we are satisfied that there will be no risk of a repetition of the same or of any other offence when he resumes practice, there will be no prejudice to the public interest.

I have taken into account that he is 59 years old, that he had made full restitution, that he has been truly penitent, that he has the good name of his family (including a daughter in active practice) to consider at all times, that in a town of not very great size like Ipoh he had for the past 6 years lived a blameless life or the contrary would have been known to the members of the local profession practising in the State of Perak, and that I do not consider it at all likely that he would prove unworthy of the trust which